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IN THE

Supreme Court of the United States

OCTOBER TERM - 1979

No. 79-954

EDWARD J. SHANAHAN,

Petitioner

v.

STATE OF MAINE,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MAINE

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MAINE

TO THE SUPREME JUDICIAL COURT OF MAINE

The Petitioner, Edward J. Shanahan, respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the Supreme Judicial Court of Maine, setting as the Law Court, entered in this action on August 9, 1979.

OPINION BELOW

The Opinion of the Supreme Judicial Court of Maine, not yet reported, appears in the Appendix hereto.

JURISDICTION

The Judgment and Opinion of the Supreme Judicial Court of Maine was entered on August 9, 1979. A timely Motion for Reconsideration was filed on September 7, 1979; and such Motion was thereafter denied on September 25, 1979. This Petition for Writ of Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Whether the Petitioner has been deprived of his constitutional right against self-incrimination as guaranteed under the FIFTH AMENDMENT as a consequence of the Supreme Judicial Court of Maine holding that Petitioner waived his so-called Miranda rights.

2. Whether the Petitioner has been deprived of his constitutional right to substantive and procedural due process as guaranteed under the FOURTEENTH AMENDMENT as a consequence of the Supreme Judicial Court of Maine refusing to consider and determine the voluntary or involuntary nature of the inculpatory statements of the Petitioner.

3. Whether the Petitioner has been deprived of his constitutional right to substantive and procedural due process as guaranteed under the FIFTH and FOURTEENTH AMENDMENTS as a consequence of the per se prejudice of the presiding Justice before whom the Motions to Suppress were to be presented.

4. Whether the Petitioner has been deprived of his constitutional right to substantive and procedural due process as guaranteed by the FIFTH and FOURTEENTH AMENDMENTS as a consequence of the Supreme Judicial Court

of Maine refusing to consider and determine the question of the per se prejudice of the presiding Justice before whom the Motions to Suppress were to be presented.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. CONSTITUTION OF THE UNITED STATES, AMENDMENT V:
"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

2. CONSTITUTION OF THE UNITED STATES, AMENDMENT XIV:
"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

On March 2, 1978, in Raymond, Maine, the Defendant was arrested and charged with the offense of murdering his wife, Teresa Shanahan. The State contended that the Defendant knowingly and intentionally caused her death in that he held a .38 caliber revolver in tight contact with her head and discharg-

ed the weapon. The Defendant contended that the deceased intervened in a suicidal gesture on his part; and that the weapon accidentally discharged when she attempted to prevent the suicidal posture.

Following his arraignment, the Defendant filed two Motions for supression of evidence and a single Motion for bail on June 27, 1978, all of which appears on pages 50 through 59 of Volume I - Section (1). The Motions were set for hearing on June 29, 1978. A transcript of the proceedings of that date appears on pages 1 through 58 of Volume II - Section (1). The Presiding Justice denied each of the three Motions.

Subsequently, Defendant filed a Habeas Corpus Petition which was heard on July 16, 1978, a partial transcript of which appears at pages 1 through 58 of Volume II - Section (2). Immediately prior to the hearing, the State presented to the defense a copy of Officer Greeley's investigative report wherein Greeley claims that the Defendant, following the Miranda warning, admitted shooting his wife accidentally. This report appears as Exhibit "A" on page 43 of Volume I - Section (1). The report was filed by the officer 4½ months after the occurrence.

Whereupon, the Defendant promptly filed a third Motion to suppress evidence on July 21, 1978 which appears on pages 41 through 43 of Volume I - Section (1). This Motion was never presented to any Justice in any manner. It was, however, scheduled to be heard by the Court on October 12, 1978, together with the two previous Motions.

On July 21, 1978, Defendant filed two separate Motions for reconsideration of the denials of the Motions to Suppress on June 29, 1978. The Motions were forwarded to the Justice who was sitting in another County. The reconsideration was denied without hearing on July 26th, 1978, all of which appears on pages 39 and 40 of Volume I - Section (1).

At the request of both Defendant and the State, a conference was held with the Court on September 5, 1978. Following the conference, the Court struck the denials of reconsideration dated July 26, 1978, and entered an Order reconsidering and setting aside the original denials of each Motion to suppress of June 29, 1978. Again, this action by the Court appears on each Motion at pages 39 and 40 of Volume I - Section (1). Presumably, all of this had the effect of restoring the two original Motions to the pending docket together with the Motion of July 21, 1978.

The Motions (3) were set for hearing before the same Justice on October 12, 1978 at 1:30 P.M. At about 2:30 P.M., Defendant's counsel withdrew the Motions before presentation. A transcript of that proceeding appears at pages 2 through 16 of Volume II - Section (3). The Defendant declined to go forward before the particular Justice. The particular Justice refused to permit some other Justice to hear the matters. As a consequence of this action by the Defendant on October 12th, the presiding Justice on October 20, 1978, ruled that Mr. Shanahan had waived any rights to be heard on the suppression of evidence. This ruling persisted throughout the trial.

The Defendant contends that he was justified in refusing to proceed before the particular Justice; and that the trial Justice erred in ruling that the Defendant had waived his rights to be heard on the suppression Motions.

The Petitioner is a retired New York City police officer; and he called his mother in New York immediately after the shooting. She, in turn, contacte the brother of Petitioner who is also a police officer in the City of New York. The brother called the State Police in Maine. The Lieutenant called the Petitioner on the telephone. This telephone conversation was recorded by the Lieutenant. A transcript of this conversation appears at Record Volume I, pages 55 through 58. The statements and the tape was the subject of one of the Motions to Suppress. The tape itself is designated as Defendant's Exhibit No. 14. The tape demonstrates that the Petitioner was completely out of his mind at that point.

The interrogation by Officer Pinette occurred about 22

minutes after the telephone conversation. Officer Pinette stated that the responses of the Petitioner to him were comparable to the responses of the Petitioner to the Lieutenant in the telephone conversation. Record Volume IV, pages 560 and 561.

Notwithstanding the mental and physical condition of the Petitioner, the officers persisted in their interrogation. Record Volume IV, pages 401 to 431. It is the statements and admissions occurring during these interrogations that Petitioner was seeking to suppress.

POINTS AT WHICH FEDERAL QUESTIONS WERE RAISED

I. TRIAL COURT (SUPERIOR)

The issues of due process and self-incrimination were first raised in the Trial Court by Motions to Suppress the inculpatory statements on the appropriate constitutional grounds. Maine practice permits and/or requires that these matters be heard and disposed of before trial. The Motions appear at pages 41, 42, 43, 50 and 51 of Record Volume I, Section (1). The subsequent Motions to Reconsider the Suppression Motions appear at Record Volume I, Section (1), pages 39 and 40. The hearing on the original Motions to Suppress appears at pages 1 through 58 of Record Volume II, Section (1). The Motions were denied. The action taken by the Court appears on the face of each Motion.

The hearing at which Petitioner raised the issue of per se prejudice of the Motion Justice appears at Record Volume II, Section (3), pages 7 and 8.

The ruling of the Trial Justice that the Petitioner had waived his Miranda rights appears at Record Volume III, pages 2 and 3, with the following excerpt:

"MR. ALEXANDER: You would not permit us to raise the Miranda issue?

"THE COURT: No, I will not. I think that has been

waived."

The Trial Court expressed its ruling on all the Motions to Suppress at Record Volume III, page 5:

"THE COURT: The record is very clear with regard to the suppression motions. I stated clearly on the record Friday, and I state it again, as far as I'm concerned those have been waived, I decline to conduct, hearing the issue. The issue is no longer before the Court as having been waived. To the extent you formally request a continuance, there is no necessity to put it in writing. I will have the clerk make a note of it.

"Mr. Alexander has just formally moved for a continuance; therefore, I direct his oral motion for continuance, this morning, be noted on the docket along with my ruling. The Motion is denied.

"MR. ALEXANDER: Thank you."

II. APPELLATE COURT (SUPREME JUDICIAL COURT)

The issues of due process and self-incrimination were first raised in the Supreme Judicial Court by a STATEMENT OF POINTS ON APPEAL contained in the Apellant's Brief, designated as POINT (A), on page 3 of Record Volume VI as follows:

III. STATEMENT OF POINTS ON APPEAL

Pursuant to M.R.C.P., Rule 39(a) and (d), the Appellant designated for inclusion in the Record all the proceeding and evidence in the Action. Consequently, no specific designation appears in the Record. However, the Appellant assigns sixteen (16) points as the basis of this Appeal as follows.

(A) THE COURT ERRED IN RULING THAT DEFENDANT HAD WAIVED HIS RIGHTS TO A HEARING ON

THE MOTIONS TO SUPPRESS EVIDENCE.

The issue of per se prejudice on the part of the Motion Justice was discussed in the Appellant's Brief at Record Volume VI, page 8:

> *"Our contention is that this is a type of situation wherein the facts constitute a per se prohibition to the attainment of due process of law. This issue was discreetly raised by counsel at the October 12th hearing at pages 7 and 8 of Volume II-Section (3)."*

It was only after the Supreme Judicial Court issued its Opinion that Petitioner realized that the Court had declined to consider the 14th Amendment implications relating to the voluntary or involuntary nature of the inculpatory statements and admissions of the Petitioner. Whereupon, Petitioner filed the MOTION FOR RECONSIDERATION, setting forth the points at which the issue was raised by the Petitioner.

In addition, at pages 9 and 10 of Record Volume VI, Petitioner requested the Court to consider the entire matter:

> *"On this issue, the Defendant asks this Court to carefully review in the Record all the evidence relating to the circumstances surrounding the alleged admissions of the Defendant and rule as a part of the Opinion in this case whether or not the evidence should be suppressed. The testimony of Officer Pinette and Officer Greeley appear fully at pages 377 through 460 of Volumes III and IV. The taped telephone conversation is available as Defendant's Exhibit Number 14."*

Finally, at oral argument, Counsel for Petitioner requested the Appellate Court to consider all the constitutional issues, all of which is found at page A-17 of this Petition in the MOTION FOR RECONSIDERATION:

> *"Finally, at oral argument Counsel for Appellant requested the Court to consider that all constitutional issues had been properly raised. Moreover, Counsel requested the Court to consider all constitutional questions on the theory that 'substantial justice' requires such consideration.*
>
> *Appellant in this Motion respectfully requests this Court to consider the 14th Amendment, due process implications in this proceeding. The refusal of this Court to consider all the constitutional rights of the Defendant in this proceeding is in itself a deprivation of due process."*

REASONS FOR GRANTING WRIT

THE SUPREME JUDICIAL COURT OF MAINE IN THIS INSTANCE HAS DECIDED THE SUBSTANTIAL CONSTITUTIONAL QUESTIONS INVOLVED HERE IN A MANNER PROBABLY NOT IN ACCORD WITH THE APPLICABLE DECISIONS OF THE SUPREME COURT OF THE UNITED STATES.

The Maine Court decided that the Petitioner had waived his right to a suppression hearing based upon Miranda considerations as a consequence of his refusal to present the Motions again before the Justice who had ruled against him in an earlier proceeding. Petitioner declined to go forward in the belief that he would not be treated fairly in view of the nature and attitude of the Justice and the conduct of the earlier proceeding. The question then becomes twofold:

1. Can a Defendant waive a substantial constitutional right to test the correctness of his claimed FIFTH AMENDMENT violations?

2. If so, was the Petitioner justified in his refusal to go forward on any theory of per se prejudice of the Motion Justice?

In this instance, the problem arose in the course of Petitioner's efforts to assert, **not waive,** his rights to be heard on Mo-

tions to Suppress. This Court is respectfully urged to read the transcript of the hearing on June 29, 1978 wherein the Motion Justice initially denied the suppression Motions, appearing on pages 1 through 58 of Record Volume II. Petitioner feels he was justified in the decision not to proceed on the ground that there existed a per se prohibition against due process. WITHROW vs. LARKIN, 95 S.Ct. 1456 and PICKERING vs. BOARD OF EDUCATION 88 S.Ct. 1731 and MIRANDA vs. ARIZONA, 86 S.Ct. 1602.

The Maine Court declined to consider and determine the FOURTEENTH AMENDMENT implications. Such rights cannot be waived. The Court's failure to rule on the matter is itself a deprivation of due process. The issues were seasonably raised. JACKSON vs. DENNO, 84 S.Ct. 1774.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the Judgment and Opinion of the Supreme Judicial Court of Maine.

Respectfully submitted,

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December 10, 1979

Date Opinion Filed:
August 9, 1979

Reporter of Decisions
Decision No. 2132
Law Docket No. Cum-78-53

APPENDIX

STATE OF MAINE

v.

EDWARD J. SHANAHAN

WERNICK, J.

Defendant Edward J. Shanahan was indicted, under 17-A M.R.S.A. § 201(1)(A), [1] for the murder of his wife, Teresa Shanahan. Tried before a jury in the Superior Court (Cumberland County) defendant was found guilty of manslaughter, 17-A M.R.S.A. § 203(1)(A). [2] Defendant has appealed from the judgment of conviction, asserting many claims of reversible error. We have considered all of defendant's points, and denying the appeal, we deem it of benefit to give extended discussion to three of the issues raised: (1) whether certain extra-judicial inculpatory statements made by defendant were erroneously admitted in evidence because they have been received in violation of his Miranda rights; (2) whether these

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[1] Section 201(1)(A) provides:

"1. A person is guilty of murder if:

"A. He intentionally or knowingly causes the death of another human being; . . ."

[2] Section 203(1)(A) provides:

"1. A person is guilty of manslaughter if he:

"A. Recklessly, or with criminal negligence, causes the death of another human being; or . . . ."

statements were wrongly admitted in evidence because, independently of them, the corpus delicti of the crime charged was not adequately shown; and (3) whether the jury's verdict was supportable on all the evidence.

The prosecution's theory at trial was that defendant had "intentionally or knowingly" killed his wife by shooting her, with the muzzle of a pistol placed against her head. The verdict finding defendant guilty of manslaughter, instead of murder, signifies that the jury concluded defendant had killed his wife "recklessly" or with "criminal negligence", rather than "intentionally" or "knowingly."

The evidence showed these circumstances. At 10:30 a.m. on March 2, 1978 defendant drove his peach colored Ford Mustang on Quaker Ridge Road in South Casco, Maine, proceeding in the direction away from Raymond towards Lewiston. Suddenly making a u-turn in the middle of the road, he reversed direction and drove towards his home.[3]

Having returned to his home, defendant heard the telephone ringing. His brother Frank Shanahan was calling from New York City. Defendant spoke with his brother. He told him, repeatedly, that his wife had been badly hurt, but he made no response to his brother's questions asking how she had sustained injury. At one point in the conversation defendant said that he thought his wife was dead. When his brother asked him whether he had called a doctor, defendant replied that he had not. Defendant's brother told defendant that he was going to call the Maine State Police, and defendant encouraged him to do so. Frank Shanahan thereupon called the Maine State Police Barracks in Scarborough, Maine, and informed them of what he had learned on the telephone. While his brother was calling the State Police, defendant made a telephone call to Dr. John Painter at his office in Raymond, Maine. He asked Dr. Painter to come to his house at once, saying his wife had been shot but giving no explanation of what had happened. Dr. Painter agreed to come right away.

[3] Testifying in his own behalf, defendant gave the explanation that he had left his home to go for a doctor in Raymond. Being very confused, he had been driving in the wrong direction, and when he realized it, he made the u-turn to go in the opposite direction, back to Raymond.

State Police Trooper Wayne Denbow was directed by a radio message to go to defendant's home in Raymond. He arrived at 10:52 a.m. He saw no one outside the house, and following his radio instructions, he waited until more police arrived. Meanwhile, at 10:55 a.m. State Police Lieutenant LaMontagne telephoned the Shanahan residence. Defendant answered, and after a brief conversation with him, which he taped, Lieutenant LaMontagne instructed defendant to go outside and to wait for the police to arrive.

In the meantime, Corporal Gabrielski, Corporal Savage and Sergeant Smith had arrived on the scene to reinforce Officer Denbow, and with him they stayed outside the house. Very soon thereafter, defendant emerged from the house. He had his hands in the air and said: "Don't shoot! Don't shoot!" Sergeant Smith immediately placed defendant under arrest. Denbow, Gabrielski and Savage went into the house. The body of Teresa Shanahan was found on the floor in an upstairs bedroom. A pistol was on the bed. Blood stains were seen on the walls of the bedroom, and in an adjoining bathroom blood stains were found on the washbasin and on a washcloth and towelling. Subsequent medical examination revealed that Mrs. Shanahan was dead when her body had been discovered. She had been killed by a bullet which had entered at her right temple, passed through her brain and emerged through the left temple area, near the bottom of the ear.

After he was arrested, defendant was placed in a police cruiser vehicle. State Police Officer James Pinette, who arrived at the Shanahan residence at 11:17 a.m., informed defendant of his Miranda rights and asked him whether he understood them. Defendant gave an affirmative reply. Pinette then asked whether defendant wished to waive his rights and make a statement. Without responding to the question, defendant began talking

about the events of that morning. He said first, referring to his wife, "I want her back." Defendant then discussed the shooting incident at some length with Pinette. (At trial, defendant testified that he had no recollection of his conversation with Pinette, and that he did not know what, if anything, he said to the officer.)

After he had finished talking with Pinette, defendant was taken in an automobile by Officer Martin Greeley and Sergeant Bradford Smith to the detention facility at the Cumberland County Sheriff's Office in Portland, Maine. During the ride to Portland, defendant was given a second set of Miranda warnings by Officer Greeley. He agreed to waive his Miranda rights and had a conversation with Officer Greeley concerning the death of his wife.

At the Sheriff's Office defendant was booked by Deputy Sheriff James Langello, who testified that defendant took "a great deal of time" answering "common questions" relating to his name, date of birth, etc. Defendant was then interviewed by Dr. Roger Zimmerman, a clinical psychologist who worked as Director of Health Services at the Sheriff's Department.

Dr. Zimmerman formed the opinion that defendant was suffering from an "agitated depression of psychotic proportion" and that he might attempt to commit suicide. He asked Dr. Stephen Soreff of the Maine Medical Center to examine Shanahan and render a second opinion. Dr. Soreff agreed. At 4:00 p.m. that afternoon Dr. Soreff examined Shanahan in the emergency room of the Maine Medical Center and concluded that Shanahan was suffering from both psychotic depression and organic brain syndrome partially caused by alcohol consumption. Dr. Soreff believed that for Shanahan's own safety he should be committed to the Augusta Mental Health Institute for observation and treatment.

At some point later in the evening of March 2, 1978, defendant was transported to the Augusta Mental Health Institute where he was examined by Dr. Ulrich Jacobsohn, the clinical director of the Institute. Dr. Jacobsohn concluded that defendant was not suffering from any psychosis, and he was released from the Institute that evening.

1. The Claimed Miranda Violations.

On June 27, 1978 counsel for defendant filed two motions to suppress extra-judicial inculpatory statements he had made as evidence against him. One motion was directed to defendant's telephone conversation with Lt. LaMontagne and the other to his conversation with Officer Pinette.

As to his inculpatory statements to LaMontagne, defendant maintained that he gave them without the benefit of the Miranda warnings of his constitutional rights.[4] With respect to his conversation with Officer Pinette, defendant maintained that while he had been advised of his Miranda rights before he made any statements, he had not in fact purported to waive them and, in any event, his mental condition at the time was such that he could not make an effective waiver of them.

On June 29, 1978, the two motions for suppression were consolidated for hearing with a pre-trial motion that defendant be admitted to bail, and a Justice of the Superior Court heard all three motions together. The State presented testimony by the State's Medical Examiner, Dr. Henry Ryan, and various police officers. At the close of the State's evidence, without hearing testimony from the witnesses defendant wanted to call, the Justice stated that he would deny the two suppression

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[4] As the discussion which follows shows, we decide that defendant ultimately acted in a manner which caused him to lose his right to assert alleged Miranda violations. We should note, however, that Miranda was inapplicable to defendant's conversation with Lt. LaMontagne. Miranda warnings are required only where the defendant is subjected to "custodial interrogation." Miranda v. Arizona, 384 U.S. 436, 445, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966); Beckwith v. United States, 425 U.S. 341, 345, 96 S.Ct. 1612, 48 L.Ed.2d 1 (1976). At the time of the telephone conversation with LaMontagne defendent was in his own house and not under custodial control by the police. Although Officer Den-

motions. Over defense counsel's objection that the Justice should not rule until defendant had presented his evidence, the Justice terminated the hearing.

On July 21, 1978 counsel for defendant filed a motion to reconsider the denial of defendant's motions to suppress. This motion was denied a week later, without a hearing. Subsequently, on September 5, 1978, the Justice reversed himself and held a hearing on the motion to reconsider. He decided to set aside his previous orders denying the suppression motions, and he set a date for further hearing on these motions.

On October 12, 1978, the Justice undertook the further hearing on the two suppression motions. He said that hearing would be resumed with defendant having opportunity to present such evidence as he wished. The Justice made plain that he would not permit the re-examination of witnesses who had previously been examined at the June 29, 1978 suppression hearing. Believing this ruling unfair, defendant personally addressed the presiding Justice and demanded that the hearing on the suppression motions should start entirely anew, as if the June 29th hearing had never been held. The Justice overruled this personal demand of defendant. Thereupon, and acting contrary to the advice of his attorney that he should go forward with the hearing, defendant made his own personal determination to withdraw both of his motions to suppress. Stating that he could not prevent defendant from withdrawing his motions, the presiding Justice authorized defendant to withdraw them, observing on the record that he believed that defendant was seeking to "judgeshop."

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bow may have arrived at the house and parked his car in the driveway when defendant was conversing with LaMontagne, no police officer was in close proximity to the defendant. The circumstances thus fall far short of indicating that defendant's freedom of action was limited by police officers in any way. The situation, here, is quite unlike that in Orozco v. Texas, 394 U.S. 324, 89 S.Ct. 1095, 22 L.Ed.2d 311 (1969), for example, where four police officers surprised and surrounded the defendant in his own bedroom at 4:00 o'clock in the morning.

Having withdrawn his suppression motions on October 12, 1978 defendant one week later sought to present them to another Superior Court Justice. This Justice ruled that by his prior conduct defendant had "waived" his right to be heard on his suppression motions. The Justice stated that defendant had made "a calculated decision not to proceed with a hearing before a particular Judge" and that defendant was now seeking "to have those same matters heard before another Judge . . . that is playing fast and loose with the judicial process. I do not intend to permit it." This second Justice presided at defendant's jury trial. When defendant objected at trial to the admissibility in evidence of his extrajudicial inculpatory statements on the grounds that they were received by the police in violation of Miranda, the presiding Justice overruled the objections, stating that defendant had "waived" his right to make such claims and was, therefore, permanently foreclosed from having them judicially considered.

The proceedings described above yield no reason for a reversal of the judgment of conviction. Although defendant's motions to suppress spoke generally of a violation of defendant's "constitutional rights" without referring particularly to Miranda violations, the record of the June 29th hearing makes plain that defendant was relying only on such constitutional rights as are guaranteed him under Miranda v. Arizona, supra. Defendant's contention was that his disturbed mental condition on March 2, 1978 prevented him from fully understanding the nature of his rights under Miranda and, consequently, that he had not purported to make, and was incapable of making, a knowing and intelligent waiver of his Miranda rights. It is evident, then, that defendant never contended that his inculpatory statements were "involuntary", so as to have been independently violative of 14th Amendment "due process of law", in the sense that the police had elicited the statements by force, fraud or coercion or had exploited defendant's disturbed mental condition so as to overbear his will. We are therefore called upon, here, to evaluate only contentions that the prophylactic interests of Miranda

were not served; we have no concern with the more seriously substantive interests underlying the independent "voluntariness" required by 14th Amendment "due process of law" as a precondition of the admissibility in evidence of extra-judicial admissions, or confessions, of a defendant.[5]

Defendant initially raised his Miranda claims at a seasonable time prior to trial.[6] Unquestionably, the first hearing on June 29th did not afford defendant a fair opportunity to present these claims, inasmuch as the presiding Justice refused to allow the defendant to present his own evidence in support of his motions to suppress. However, the Justice who presided, later realizing that he may have erred, set aside his denial of the sup-

[5] Recently, the Supreme Court of the United States contrasted the prophylactic nature of Miranda rights, as infusing the "voluntariness" by which such rights may be effectively waived, with the more strongly substantive concerns embodied in the independent concept of "voluntariness" mandated by 14th Amendment "due process of law." In Mincey v. Arizona, _____U.S._____, 98 S.Ct. ____, 57 L.Ed.2d 290, 303 (1978) the Court said:

> "Statements made by a defendant in circumstances violating the strictures of Miranda v. Arizona, . . . are admissible for impeachment if their 'trustworthiness . . . satisfies legal standards.' Harris v New York, ... But any criminal trial use against a defendant of his involuntary statement is a denial of due process of law, 'even though there is ample evidence aside from the confession to support the conviction.' Jackson v Denno, . . . [378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964)] at 376 . . . ." (emphasis added)

See also Michigan v. Tucker, 417 U.S. 433, 446-448, 94 S.Ct. 2357, 41 L.Ed.2d 182 (1974).

[6] In State v. Bishop, Me., 392 A.2d 20 (1978) we decided that where a defendant fails to make a seasonable pre-trial motion to suppress evidence allegedly obtained in violation of the rights guaranteed by the 4th-14th Amendments to the Constitution of the United States, he will be barred, absent special circumstances, from raising those same issues at trial. We have not yet decided, however, whether motions to suppress evidence obtained in violation of a defendant's rights under the 5th-14th Amendments must likewise be made prior to trial. See also State v. Hazelton, Me., 330 A.2d 919 (1975). We have no occasion to decide the issue, here, where defendant did file his motions to suppress seasonably before trial. Thus, we now intimate no opinion on the issue of whether or not a defendant will lose the right to object at trial to the admissibility in evidence of proffered extra-judicial admissions of defendant, claimed to have been received in violation of rights guaranteed under the 5th-14th Amendments to the Constitution of the United States, if defendant has not moved to suppress such evidence seasonably before trial.

pression motions and afforded defendant fair opportunity, still seasonably prior to trial, to complete the hearing as to his Miranda claims. Defendant made a deliberate tactical choice not to avail himself of this opportunity. He decided to withdraw his motions to suppress as they were then pending before one Superior Court Justice, this move being the first step in attempting to bring them forward later to be considered by another Justice.

A defendant's right to a judicial hearing of claims that his constitutional rights have been violated does not include a right to have the determination made by a Justice of defendant's own choosing, or preference. Thus, when on October 12th the Justice of the Superior Court before whom defendant's motions to suppress had been pending, and who had already undertaken to hear them, concluded that further hearing should be held, defendant had no right to withdraw his suppression motions as a maneuver to circumvent such further hearing and to seek to present the motions for the consideration of another Justice. If defendant believed that the first Justice had proceeded erroneously, or unfairly, his proper course was to make appropriate objections to preserve his claims on the record and then seek appropriate remedies for the alleged errors by appeal. Defendant had no right to take matters into his own hands to provide a remedy that he thought would work better, by resorting to the tactic of withdrawing his motions to suppress as his first step to undertake "judgeshopping." We decide that this conduct by

defendant constituted a deliberate by-pass of sound procedural requirements, in consequence of which defendant must be taken to have lost his right to a judicial determination of his claims of Miranda violations as a ground for the exclusion from evidence of his extra-judicial inculpatory statements.

We stress that in so deciding, we are not purporting to settle the issue whether or not a defendant must raise 'claims of Miranda violations at a seasonable time prior to trial upon peril that the failure so to assert such claims will constitute a procedural default depriving defendant of the right to assert the claims during trial. See n. 6, supra. We now hold only that when a defendant (1) chooses to raise Miranda issues seasonably before trial and (2) then proceeds to withdraw them from judicial consideration for the patently invalid reason of avoiding having them decided by the Justice before whom they are pending and seeking to have them decided by a different Justice more to defendant's liking, it is not an abuse of discretion for a second Justice before whom defendant tries to reassert the claims, whether pre-trial or at trial, to rule that the defendant was guilty of a deliberate by-passing of procedural requirements and thus lost his right to a judicial determination of his claims of Miranda violations.[7]

2. The Corpus Delicti Issue.

Defendant contends that his admissions should not have been admitted in evidence at trial because the prosecution failed to satisfy the requirements of the corpus delicti rule which, as

[7] We stress, too, that this decision concerns only Miranda claims, as distinguished from claims that defendant's admissions, or confession, had been "involuntary" so as to be independently in violation of the "due process of law" guaranty of the 14th Amendment. As to this latter ground for suppression of evidence, we have no present occasion to decide whether the right to assert it at trial can be lost by virtue of a prior by-passing of procedural requirements.

applied to a charge of murder, requires that the prosecution present

> "(1) evidence creating a substantial belief that the identity of the deceased is the person named in the indictment as the victim; [and] (2) evidence creating a substantial belief that the crime charged had been committed by someone." State v. Davis, Me., 374 A.2d 322, 324 (1977).

It is not open to dispute, here, that the State satisfied the first element of the corpus delicti rule by proving that Teresa Shanahan was the person found dead in defendant's home on March 2, 1978. To satisfy the second element, the State was obligated to present evidence which created a substantial belief that Teresa Shanahan's death was not a suicide, and that it was not a suicide, and that it was not purely accidental and devoid of any criminal agency. In Davis, supra, this Court noted that a number of evidentiary factors established that a criminal agency had been at work: (1) the autopsy established that the deceased died from a blow on the back of the head; (2) the victim's body had been stabbed repeatedly; (3) the body had been transported after death had occurred; and (4) the victim's car had been stolen. Since these factors plainly negatived any possibility of suicide or accident, we held in Davis that the State had satisfied the second element of the corpus delicti rule and that defendant's admissions were properly admitted in evidence based upon this foundation.

Contrasting with Davis is State v. Peterson, 145 Me. 279, 75 A.2d 368 (1950), where this Court reversed a manslaughter conviction because the State had not effectively negated the possibility that the deceased could have died as a result of an accident, or that she could have committed suicide and that, therefore, the corpus delicti not having been sufficiently shown, the admission in evidence of defendant's inculpatory statements was prejudicial error. In Peterson this Court quoted approvingly from Wharton's Criminal Evidence, Vol. II, § 872 (1935):

"To sustain a conviction, proof of the criminal agency is indispensable as the proof of death. The fact of death is not sufficient; it must affirmatively appear that the death was not accidental, that it was not due to natural causes, and that it was not due to the act of the deceased. Where it is shown by evidence, on one side, that death may have been accidental, or it may have been the result of natural causes, and that it was not due to the act of the deceased. Where it is shown by evidence, on one side, that death may have been accidental, or it may have been the result of natural causes or due to suicide, and on the other side, that it was through criminal agency, a conviction cannot be sustained. Proof of death cannot rest in the disjunctive. It must affirmatively appear that the death resulted from criminal agency." (emphasis added) Id. at 289.

Bearing in mind these legal principles, we turn to the evidence which the State had presented at the time of defendant's corpus delicti objection to the admission of his inculpatory statements. By then, the State had adduced evidence indicating that (1) the gunshot wound which killed Teresa Shanahan was a contact wound, i.e., one caused by the placing of the muzzle of the firearm directly against the victim's head; and (2) bloodstains were found around the washbasin and on a washcloth and towelling in the bathroom adjacent to the bedroom where the deceased was found.

Although Dr. Henry Ryan, the State Medical Examiner, conceded in his testimony that the location of the wound, as a contact wound, was consistent with either suicide or intentional murder, he further testified that despite a possibility that Mrs. Shanahan could be ambulatory for approximately fifteen minutes after having been wounded as she was, his opinion was that it was doubtful that "she moved about to any extent at all."

This evidence and the additional evidence of the presence of bloodstains in the bathroom around the washbasin and on a washcloth and towelling was a sufficient showing of the corpus

delicti to make admissible in evidence the statements of defendant implicating him as the perpetrator of the unlawful homicide at issue. As we said in State v. Ames, Me., 388 A.2d 94, 96 (1978), the standard for this purpose is whether the evidence is adequate to provide " 'probable cause' to believe that the crime charged has been committed by some person." Here, the evidence amply gave probable cause to believe that a person other than the victim went to the bathroom to wash away bloodstains from his, or her, person. Such effort to conceal, by removing, the existence of bloodstains on the person, in immediate conjuction with the fact that another person was in an adjacent room shot through the head, the wound being a contact wound, is enough to generate probable cause to believe that this other person who had undertaken to wash away blood was thereby indicating guilt of having shot the victim in a manner such that the killing was an intentional, knowing, murder.[8]

The admission in evidence of defendant's inculpatory statements did not violate the rule requiring a "probable cause" showing of the corpus delicti as a prerequisite of the admissibility of such evidence.[9]

3. Sufficiency of the Evidence

Defendant contends that the evidence was insufficient to support a conviction of manslaughter, pursuant to 17-A M.R.S.A. § 203(1)(A). We have reviewed the evidence in the trial record, and we conclude that defendant's own trial testimony, standing alone, would provide adequate support for the conviction. In addition, the testimony of Officers Pinette and Greeley, concerning defendant's admissions made to them, also provide support for the jury's verdict. The testimony of Pinette,

---

[8] See Shakespeare, Macbeth, Act II, Scene 2: "A little water clears us of the deed." (Lady Macbeth to Macbeth).

[9] See State v. Davis, supra, n.2 at 324.

Greeley and the defendant varied in some respects, but all agreed that the killing was unintentional, and that the defendant had not intended to fire the gun at his wife. Officer Pinette testified concerning his conversation with defendant on the morning of defendant's arrest:

> "Mr. Shanahan stated that he took a 38-caliber revolver, a 38-caliber handgun which he knew was loaded, from the night stand on the right side of the bed and raised it and as he did, and I [Pinette] made the motions, put my hand, and going down and picking up the handgun as he continued, he said he pulled the trigger hitting his wife. I made the motion like going in the night stand like so, and he answered that was correct.
>
> "[H]e stated he had not intended to shoot her, the shooting had been accidental, he had taken out the gun to impress her. He stated he had on different occasions pointed the gun at himself to scare her and to draw sympathy to himself." (emphasis added)

Officer Greeley testified as to what defendant told him, and gave a slightly different version of the events which led to Teresa Shanahan's death:

> "He stated that he was in the bedroom, he was taking his 38 revolver from the night stand which was beside the bed, and as he was lifting the revolver out of the drawer to this night stand, it went off and struck his wife who was on the other side of the bed. He stated it was an accident." (emphasis added)

Finally, defendant took the stand at trial and offered his own explanation of what had transpired:

> "[S]he [Teresa Shanahan] was sitting by the end table on her side, just finished getting dressed, and I had the revolver and I came back to the edge of the bed facing the bed on the left-hand side, at the very edge, and I raised the gun towards my head, cocking the trigger, and thinking that if I was going to die or commit suicide, I wanted to do it near her, and that's why I did it that way. She either heard the gun cocking or saw me in the process of raising it to my head, and she jumped up and she said something like, 'No Eddie, don't Eddie.' And she grabbed my hand and pulled the gun down away from my head and, pointed it towards her, then there was an explosion and then I don't — for a while I don't know. (emphasis added)

A conviction for manslaughter is plainly supportable by proof that the defendant (1) consciously disregarded a risk; (2) defendant's conduct constituted a gross deviation from the conduct of a reasonable man; and (3) defendant's conduct caused the death of the deceased. Defendant's own testimony by itself was enough to support the jury's finding of the elements of reckless manslaughter. Defendant admitted that he knew the pistol was loaded, that he cocked the trigger and raised it to his head in a deliberate effort to obtain his wife's attention and sympathy. The jury could infer that he was prompting her to intervene in order to thwart what must have appeared to her to be a suicide attempt on the part of her husband. The jury could also infer that the defendant was aware of the possibility that she might attempt to wrest the gun away from him, and that in the course of a struggle for the gun there was a serious danger that the gun might accidentally discharge causing serious injury or death to one of them. The jury was entitled to conclude that defendant's conscious disregard of this risk constituted a gross deviation from the conduct of a reasonably prudent man. Lastly, under the "causation" pro-

visions of 17-A M.R.S.A§ 56,[10] Teresa Shanahan's conduct in attempting to wrest the gun away from her husband cannot be held to be, as a matter of law, an intervening cause relieving defendant of criminal responsibility for her death.

The jury had an adequate evidentiary basis for deciding beyond a reasonable doubt that defendant was guilty of the crime of reckless manslaughter.

The entry is:

Appeal denied.

Judgment of conviction affirmed.

DELAHANTY, J., did not sit.

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10 The statute reads:

> "Unless otherwise provided, when causing a result is an element of a crime, causation may be found where the result would not have occurred but for the conduct of the defendant operating either alone or concurrently with another cause, unless the concurrent cause was clearly sufficient to produce the result and the conduct of the defendant was clearly insufficient."

STATE OF MAINE **SUPREME JUDICIAL COURT**

CUMBERLAND, SS:

* * * * * * * * * * *

STATE OF MAINE, *

vs. * **Motion for Reconsideration**

*

EDWARD J. SHANAHAN, *

Defendant * **LAW COURT**

* * * * * * * * * * * **DOCKET NUMBER** 78-53

NOW comes the Appellant and moves this Honorable Court to reconsider the Opinion denying the Appeal dated August 9, 1979, on the grounds that:

(1) The Court in its Opinion rejected Points D through P without comment. The Court in this Motion is respectfully urged to reconsider POINT K, "THE COURT ERRED IN EXCLUDING THE TESTIMONY OF THE WITNESS EMERY JORDAN."

A critical issue in the case was whether or not the fatal wound was of a contact type as contended by the State. The Defendant presented Emery Jordan, a retired Captain of the Maine State Police who has had over 25 years experience in the field of ballistics and firearm identification, both as the Officer in Charge of the State Police Crime Laboratory, and later as a private consultant after his retirement. The qualifications of the witness as an expert in the area for which he was presented appear at pages 673 through 729 of VOLUME IV. The ruling of the Trial Court and the offer of proof commences at page 702 of VOLUME IV.

The testimony of Mr. Jordan was of major importance

to the defense on the issue of type of wound. Moreover, whether or not this witness is indeed qualified in the particular field is of great importance to both bench and bar in cases involving gunshot wounds.

The Point deserves a more thorough discussion both as it relates to the Defendant and its general application in the criminal law practice.

(2) The Court in its discussion and rejection of POINT A, THE COURT ERRED IN RULING THAT THE DEFENDANT WAIVED HIS RIGHTS TO A HEARING ON THE MOTIONS TO SUPPRESS EVIDENCE," was silent on the issue of "per se prejudice" of the Motion Justice, as raised by the Defendant in his Brief at pages 8 and 9.

Whether or not the Defendant was justified in refusing to proceed before the particular Justice on the legal principle of "per se prejudice" was not addressed by this Court. The "per se prejudice" concept deserves a thorough discussion in view of this Court's statement on page 10 of the Opinion that "Unquestionably, the first hearing on June 29th did not afford defendant a fair opportunity to present these claims, inasmuch as the presiding Justice refused to allow the defendant to present his own evidence in support of his motions to suppress."

(3) The Court in its discussion and rejection of POINT A, THE COURT ERRED IN RULING THAT THE DEFENDANT WAIVED HIS RIGHTS TO A HEARING ON THE MOTIONS TO SUPPRESS EVIDENCE, refused to consider the 14th Amendment, Due Process implications of the Officer's conduct in obtaining the alleged admissions of the Defendant on the sole basis that such express constitutional reference was never advanced by the Defendant. Consequently, the Defendant has been deprived of a

truly substantial constitutional right to test the voluntariness of the alleged admissions.

The Defendant respectfully points out the following instances in the Record wherein that particular constitutional right was being considered by the Court and/or Counsel notwithstanding the fact that a specific citation to the particular amendment was not mentioned:

(a) Volume I, Section (1), pages 41, 42, 43, 50 and 51 on the Motions to Suppress.

(b) Volume I, Section (1), pages 39 and 40 in Motions to Reconsider

(c) Volume II, Section (1), pages 1, 3, 6, 32, 51 and 55 in the proceeding before the Motion Justice on June 29, 1978.

(d) Volume III, pages 2 and 3, the Trial Justice's preservation of the issue of whether or not the statements were voluntary.

(e) Volume IV, pages 546, 548, 549, 550 and 551, particularly at page 548 wherein Defense Counsel clearly raises the issue of whether or not the statements were voluntary.

(f) Volume V, pages 1027 and 1028, wherein the Trial Court instructed the Jury on the issue of whether or not the statements were voluntary.

(g) Volume IV, page 430, a ruling and reference by the Trial Justice on the issue of voluntariness.

(h) Volume III, page 214, Defense Counsel refers to the issue of voluntariness of the admissions.

(i) Volume III, pages 391, 392, 393, and exchange between Court and Counsel on the issue of voluntariness.

(j) Appellant's Brief, pages 9 and 10 wherein Appellant asks this Court to consider all evidence of the circumstances surrounding the alleged admissions and rule whether or not the statements should be suppressed on any grounds.

Finally, at oral argument Counsel for Appellant requested the Court to consider that all constitutional issues had been properly raised. Moreover, Counsel requested the Court to consider all constitutional questions on the theory that "substantial justice" requires such consideration.

Appellant in this Motion respectfully requests this Court to consider the 14th Amendment, due process implications in this proceeding. The refusal of this Court to consider all the constitutional rights of the Defendant in this proceeding is in itself a deprivation of due process.

DATED: September 7, 1979 Respectfully submitted,

Grover G. Alexander

STATE OF MAINE **SUPREME JUDICIAL COURT**
Sitting as the Law Court

CUMBERLAND, SS:

CUM-78-53

STATE OF MAINE)
)
v.) **ORDER**
)
EDWARD J. SHANAHAN)

In the above-entitled matter, defendant having filed a Motion for Reconsideration by the Court of its opinion denying the appeal of defendant, it is ORDERED:

the Motion for Reconsideration is denied.

Dated: September 24, 1979

For the Court

(signed) Vincent L. McKusick
Chief Justice

Delahanty, J., did not participate.

STATE OF MAINE
CLERK OF THE LAW COURT

SEP 25, 1979

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Supreme Court, U. S.
FILED
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-954

EDWARD J. SHANAHAN,
Petitioner

v.

STATE OF MAINE,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT OF THE
STATE OF MAINE

RESPONDENT'S BRIEF IN OPPOSITION

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IN THE

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v.

STATE OF MAINE,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE

RESPONDENT'S BRIEF IN OPPOSITION

OPINION BELOW

The opinion of the Supreme Judicial Court of Maine (Pet. A1-A16) affirming the conviction of the Petitioner of manslaughter is reported as State v. Shanahan, 404 A.2d 975 (Me. 1979).

JURISDICTION

The judgment of the Supreme Judicial Court of Maine was entered on August 9, 1979, and the court's mandate was issued on the same day. Petitioner filed on September 14, 1979, a "Motion for Reconsideration" (Pet. A17-A20), which was denied summarily by order of the Supreme Judicial Court dated September 24, 1979. (Pet. A21). Petitioner filed his Petition in this Court on December 19, 1979, more than ninety days after the entry of final judgment by the Supreme Judicial Court of Maine. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. §1257(3). For the reasons set forth in Argument I of this Brief, the Petition should be dismissed because it has been filed out of time.

QUESTIONS PRESENTED

1. WHETHER A STATE COURT MAY TREAT AS A PROCEDURAL DEFAULT WHICH DISENTITLES A DEFENDANT TO A JUDICIAL DETERMINATION OF HIS MIRANDA-BASED OBJECTION THE DEFENDANT'S DELIBERATE ELECTION TO WITHDRAW HIS PRETRIAL MOTION TO SUPPRESS FOR THE PURPOSE OF "JUDGESHOPPING."

2. WHETHER THE ACTIONS OF THE MOTION JUSTICE CONSTITUTED "PER SE PREJUDICE" AND JUSTIFIED PETITIONER'S WITHDRAWAL OF HIS PRETRIAL, MIRANDA-BASED OBJECTION AND HIS ATTEMPT TO RAISE THE OBJECTION BEFORE A DIFFERENT JUSTICE.

3. WHETHER PETITIONER WAS ENTITLED TO A HEARING AS TO THE VOLUNTARINESS OF HIS EXTRAJUDICIAL INCULPATORY STATEMENTS NOTWITHSTANDING HIS FAILURE TO OBJECT AT TRIAL OR ON APPEAL TO THE ADMISSION OF THE STATEMENTS ON THE GROUND THAT THEY WERE INVOLUNTARY.

STATEMENT OF THE CASE

Respondent finds Petitioner's "Statement of the Case" (Pet. 3-6) unsatisfactory because it omits numerous matters relevant to a consideration of the

questions raised. However, rather than recite independently here the lengthy procedural history pertinent to the issues presented, for purposes of its "Brief in Opposition" Respondent relies on and incorporates herein the facts recited by the Supreme Judicial Court of Maine in its opinion denying Petitioner's direct appeal. (Pet. A2-A7).

ARGUMENT

I. THE PETITION SHOULD BE DISMISSED BECAUSE IT WAS FILED OUT OF TIME.

Pursuant to Sup. Ct. R. 22(1), Petitioner was required to file his Petition in this Court within ninety days of the entry of judgment by the Supreme Judicial Court of Maine. The Maine court judgment having been entered on August 9, 1979, the petition for certiorari should have been filed on November 7, 1979. Peti-

tioner filed his Petition, however, on December 19, 1979, forty-two days after the termination of the ninety-day period.

Petitioner would contend that his Petition was timely filed because he had filed in the Maine Supreme Judicial Court, within the ninety-day period of Rule 22(1), a motion for reconsideration. Ordinarily, the filing of a motion for reconsideration or rehearing within the time prescribed by the state court will toll the running of the ninety-day period. See, e.g., United States v. Healy, 364 U.S. 75, 77-80 (1964). This general rule should be inapplicable here since no authority existed for the Petitioner's motion for reconsideration. In Maine there exists no statute or court rule authorizing rehearing or reconsideration by the State's highest court. Consequently, there exists no statute or court rule

prescribing a time limit for the filing of a motion for reconsideration or rehearing. Although such motions are occasionally filed the Maine Supreme Judicial Court has held repeatedly that it is without jurisdiction to reconsider its judgment after the issuance of its mandate, except in those limited instances "for the purpose of correction [of the mandate], where there has been some irregularity or error in its issuance, as where it was issued contrary to the rules of court, or where by reason of clerical mistake, it does not correctly express the judgment of the court... ." Ginn v. Penobscot Co., 342 A.2d 270, 275 (Me. 1975); accord, Hodgdon v. Fuller, 398 A.2d 798, 800 (Me. 1979); Rand v. B. G. Pride Realty, 360 A.2d 519, 521-22 (Me. 1976). In the instant case, Petitioner's motion was denied by the Maine court without hearing and without discussion of the merits.

Because the Maine court was without jurisdiction to reconsider its judgment on the grounds advanced by Petitioner, Petitioner's motion for reconsideration should not be deemed to toll the running of the ninety-day period.

Although the untimely filing of a petition for certiorari is not a jurisdictional defect, lack of timeliness should result in dismissal in this case because there exist no compelling reasons for waiver of the requirement. Petitioner's reliance on his motion for reconsideration to circumvent the time limitation cannot be justified in view of the absence of any authority in Maine for the filing or entertainment of such a motion and the jurisdictional bar to such motions (where, as here, the motion is filed after the issuance of the court's mandate) recognized by Ginn v. Penobscot Co., supra, and subsequent decisions.

II. THE DETERMINATION OF THE MAINE COURT THAT PETITIONER'S TACTICAL DECISION TO "JUDGESHOP" DISENTITLED HIM TO A HEARING ON HIS MIRANDA-BASED OBJECTION TO THE ADMISSION OF HIS INCULPATORY STATEMENTS IS NEITHER INCORRECT NOR IN CONFLICT WITH THE DECISIONS OF THIS COURT.

Having filed pretrial motions to suppress his extrajudicial inculpatory statements on the ground that they were obtained in violation of Miranda v. Arizona, 384 U.S. 436 (1966), Petitioner, acting contrary to the advice of his attorney, personally demanded that the motions be withdrawn in order that they could be heard by a justice other than the justice before whom the motions were pending. The principal question presented by the Petition is the correctness of the determination of the Supreme Judicial Court of Maine that Petitioner's deliberate election to engage in "judgeshopping" disentitled Petitioner to a hearing on his Miranda-based motion before a different justice.

The many significant policies militating against the "judgeshopping" conduct engaged in by Petitioner underscore the correctness of the Maine rule. The practice of "judgeshopping" casts doubt on the integrity of the trial judiciary in the eyes of the public. It places the scheduling of judicial proceedings in the hands of the defendant rather than the judiciary. It needlessly delays the commencement of trial and may seriously disrupt the schedules of individual trial justices and the courts in which they sit. It results in severe hardship to the prosecution and its witnesses when, as in this case, the defendant elects to withdraw his motion at the time of the scheduled hearing merely because he anticipates better fortune before a different justice. The rule applied by the Maine court to prevent this practice of "judgeshopping," therefore, serves a legitimate state interest

while imposing no impediment to the reasonable presentation of Miranda-based claims in the trial courts. A contrary result would subject to chaos and ridicule the judicial administration of criminal defendants' pretrial Miranda claims.

Moreover, the decision of the Maine court is not in conflict with the decisions of this Court. This Court has recognized that a criminal defendant can waive judicial determination of an alleged violation of Miranda v. Arizona by his failure to comply with a state's "contemporaneous objection" rule. Wainwright v. Sykes, 433 U.S. 72 (1977). In the instant case the Maine court expressly declined to adopt a rule as stringent as the Florida rule, examined in Wainwright v. Sykes, requiring Miranda-based objections to be raised prior to trial. The Maine court held only that when a Miranda-based objection is raised

prior to trial, policies militating against "judgeshopping" preclude a defendant from withdrawing and later attempting to renew the objection solely and expressly because the defendant is dissatisfied with the justice who is assigned to hear the matter. Given the importance of the policies underlying the holding below and the untenable consequences of a contrary result, it is very unlikely that any conflict with the Maine court's determination would ever arise.

III. PETITIONER'S CLAIM THAT THE CONDUCT OF THE MOTION JUSTICE CONSTITUTED "PER SE PREJUDICE" ENTITLING PETITIONER TO "JUDGE-SHOP" IS NOT SUPPORTED BY THE FACTS.

In a cursory statement in his brief on direct appeal (quoted at Pet. 8), Petitioner claimed that the conduct of the motion justice in terminating prematurely the suppression hearing constituted "per se

prejudice" entitling Petitioner to withdraw his motions to suppress and to seek to have them heard by a different justice. The Maine Supreme Judicial Court implicitly rejected this claim by its determination that Petitioner's "judgeshopping" tactic constituted a waiver of his entitlement to a hearing (Pet. A9-A10) and by its recognition that the motion justice, "realizing that he may have erred, set aside his denial of the suppression motions and afforded defendant fair opportunity, still seasonably prior to trial, to complete the hearing as to his Miranda claims." (Pet. A8-A9).

Petitioner's claim that the action of the Motion Justice in prematurely terminating the suppression hearing without affording Petitioner an opportunity to present witnesses constituted per se prejudice is not supported by the facts. The state court

record suggests that at the time he terminated the suppression hearing the motion justice was unaware that Petitioner desired to present any witnesses. The Prosecuting Attorney stated for the record that "it's my understanding and I'm sure it's the Court's understanding without it being reflected in the record nor it being formally said that defendant wasn't -- defense was not going to offer any witnesses and I think probably your decision was in that light." (Vol. II (§1) at 53). When later it was brought to the attention of the motion justice that he may have prematurely terminated the suppression hearing, the justice set aside his denials of the motions to suppress, continued trial for two months and afforded Petitioner a full opportunity to present anew his motions to suppress - an opportunity rejected by Petitioner, who elected to withdraw his

motions and attempt to resurrect them before a different justice. In view of Petitioner's explicit acknowledgment in his state court brief that there existed no actual bias on the part of the motion justice (Petitioner's State Court Brief at 8), and in view of the absence of any indication that the justice became embroiled in any personal controversy with Petitioner or defense counsel, see Withrow v. Larkin, 421 U.S. 35, 47 & cases cited at n. 15 (1975), there is no support for the claim of per se prejudice.

IV. THE QUESTION AS TO THE VOLUNTARINESS OF PETITIONER'S STATEMENTS TO POLICE WAS NEVER PROPERLY RAISED IN THE STATE COURTS.

As the Supreme Judicial Court of Maine expressly found (Pet. A8, A10 n.7), Petitioner made no objection prior to trial or at trial to the admission of his statements on the ground that they were involuntary, nor did he raise such a claim in

his direct appeal. Petitioner's challenge to the admission of his statements at trial and on appeal was founded solely on his claim that they were obtained in violation of Miranda v. Arizona, supra. Moreover, Petitioner's attempt to raise the issue by way of his motion for reconsideration filed after the denial of his appeal comes too late, particularly in view of the inability of the Maine Court to entertain the post-appeal motion (see Argument I, ante). See, e.g., Herndon v. Georgia, 295 U.S. 441, 443 (1935). Contrary to Petitioner's suggestion (Pet. 10), the determination by the Maine Supreme Judicial Court that a hearing on the issue of voluntariness was not required absent some contemporaneous challenge to the voluntariness of the statements sought to be used against Petitioner does not conflict with the holdings of this Court. See Wainwright v. Sykes, 433 U.S. 72, 86 (1977).

V. THE PETITION DOES NOT PRESENT A QUESTION SUFFICIENTLY IMPORTANT TO WARRANT THIS COURT'S ATTENTION.

The Maine Supreme Judicial Court held that because this Petitioner, acting contrary to the advice and admonitions of his attorney and although afforded a full and fair opportunity to present the claim, personally withdrew his Miranda claim for the express purpose of having a different justice consider the issue, lost his entitlement to a judicial determination of the claim. The holding of the Maine court did not involve the determination of a significant constitutional issue likely to have a substantial impact upon criminal defendants in Maine. The limited procedural rule adopted by the Maine court would apply only to those defendants who choose to raise a Miranda claim prior to trial and who then withdraw the Miranda claim "for the patently invalid reason of avoiding having [it] decided by a different Justice

more to defendant's liking."[1] (Pet. A10). The holding of the Supreme Judicial Court does not alter or conflict with any established procedural rule or constitutional principle; nor does it prevent, or erect an impediment to, the assertion of Miranda claims. Absent the judgeshopping evident in the instant case, the holding of the Maine court would not apply to any litigant other than this Petitioner.

In view of the limited scope of the Maine court's decision and in view of the fact that Petitioner's own trial testimony was sufficient by itself to support his conviction of the crime of manslaughter (Pet. A13, A15), the exercise of this Court's discretionary jurisdiction is not warranted.

---

1. The Maine court also indicated that application of the limited rule it adopted would be left to the discretion of the second justice before whom the defendant attempts to reassert his claim. (Pet. A10).

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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January 16, 1980

Supreme Court, U.S.
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IN THE

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79-954

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STATE OF MAINE

PETITIONER'S REPLY BRIEF

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IN THE

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PETITIONER'S REPLY BRIEF

The Respondent argues that the Petition should be dismissed on the ground that the Petition was filed out of time. Specifically, that Maine practice does not permit a MOTION FOR RECONSIDERATION; and that the Motion filed by Petitioner was a nullity.

This Court's attention is called to the Provisions of M.R.C.P. 75B(a) relating to Motions before the Law Court as follows:

> "(a) Procedure on Motions. Unless another form is prescribed by these rules, an application to the Law Court for an order or other relief shall be by motion, which shall be in writing, shall state with particularity the grounds therefor and shall set forth the order or relief sought."

The Rule has been construed repeatedly to include both pre and post judgment matters. In RAND vs. B.G. PRIDE REALTY, 360 Atlantic 2nd 519 at 521, the Court said:

> "the general rule espoused in Mather v. Cunningham, supra, stands modified by Rule 75B to the extent of permitting the Law Court to protect the integrity of its own processes and allowing it to implement the generally recognized exceptions to the general rule. Indeed, an appellate court does not lose jurisdiction of the case and may recall its

mandate for the purpose of correction where there has been some irregularity or error in its issuance, as where it was issued contrary to the rules of the court, or where, by reason of clerical mistake, it does not correctly express the judgment of the court . . . as where the judgment transmitted by the appellate court, because of inadvertent error, mistake, fraud, or lack of jurisdiction, was not in fact the judgment of the court . . ."

and

" We may retain jurisdiction under Rule 75B without the benefit of specific statutory authorization because of our inherent power to specify the particular time at which we divest ourselves of jurisdiction."

A classic example of the Supreme Judicial Court of Maine accepting and acting upon a MOTION FOR RECONSIDERATION is found in MAINE CENTRAL RAILROAD COMPANY vs. HALPERIN, 381 Atlantic 2nd, 8 at page 9:

"WERNICK, Justice.
On motion for reconsideration.
Plaintiff Maine Central has moved for

reconsideration of the Court's November 16, 1977 opinion in this case. 379 A. 2d 980. Maine Central's motion asks us to address the issue
'whether the imposition of the Maine Railroad Excise Tax under the specific circumstances affecting Maine Central's net railway operating income in 1974 contravened the Commerce (Clause) . . '

Maine Central suggests that this question became obscured, inadvertently, in the attention concentrated on the broader argument that it is facially unconstitutional to include incentive per diem income in the 'net railway operating income' used to compute the excise on railroads. Although we are satisfied that in its fundamental import our original opinion sufficiently covered the 'as applied' issue now being raised, in the interest of full clarity we deem it appropriate to add a clarifying supplement."

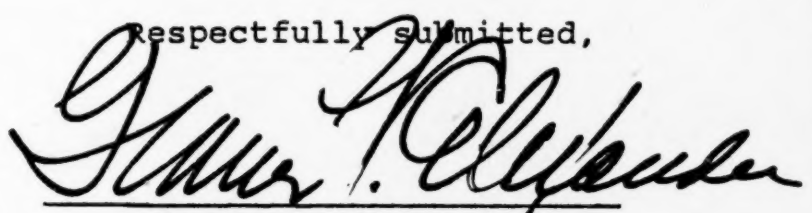
The original Opinion to which the MOTION FOR RECONSIDERATION was directed is set forth in MAINE CENTRAL RAILROAD COMPANY vs. HALPERIN, 379 Atlantic 2nd 980. Petitioner was requesting a clarification and specific con-

sideration and discussion of several issues, all as set forth in the Motion.

CONCLUSION

The MOTION FOR RECONSIDERATION filed by Petitioner was proper. The Motion was denied by the Court. Petitioner filed the Petition for Certiorari within the prescribed 90 days period. The Petition should be granted.

Respectfully submitted,



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